United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-2150

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United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

THOMAS W. SEELER, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

THE TRADING PORT, INC.,

Respondent-Appellee.

On Appeal from an Order of the United States District Court for the Northern District of New York

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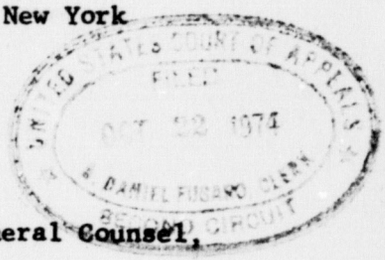
BRIEF FOR PETITIONER-APPELLANT



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OCTOBER, 1974.

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Statement of the Issues

1. Whether the court below committed reversible error by failing to provide injunctive relief under Section 10(j) of the Act requiring the Company to recognize and bargain upon request with Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, pending litigation of the unfair labor practice case before the Board, where the court below concluded that the record was more than sufficient to establish reasonable cause to believe that violations of Sections 8(a)(1) and (3) of the Act did occur, and that the predictable results of these violations would be to destroy or severely inhibit interest in that union.

Statement of the Case

This is an appeal from an order of the United States District Court for the Northern District of New York, granting in part and denying in part a petition for a temporary injunction filed on behalf of the National Labor Relations Board (herein "the Board") by Thomas W. Seeler, Regional Director of the Third Region of the Board (herein "the Regional Director"), petitioner-appellant herein, pursuant to the provisions of Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 140; 73 Stat. 544; 29 U.S.C. 160(j) herein the "Act"). 1/ The order of the court below granting in part and denying in part the Petitioner-Appellant's Petition for a Temporary Injunction was entered on June 26, 1974 (A. 82-3), 2/ predicated upon a memorandum of Findings and Conclusions entered by the court on June 4, 1974 (A. 60-80).

The Board is appealing from the injunction order insofar as the order fails to direct respondent-appellee The Trading Port, Inc. (herein "the Company"), to recognize and bargain with Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein "the Union"). See infra, pp. 18-19. Jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 of the United States Code.

1/ The relevant statutory provisions are reprinted as an addendum to this brief, infra, pp. 58-9.

2/ "A" references are to pages of the appendix. "TR" references are to pages of the transcript of the proceedings before the Administrative Law Judge upon which the Petition for Injunctive Relief Under Section 10(j) of the Act was heard in the court below. By order dated October 10, 1974, this Court granted the Board's motion for leave to permit the appeal to be heard in part on that original record.

The petition for an injunction was filed by the Regional Director after issuance of a complaint pursuant to Section 10(b) of the Act based on unfair labor practice charges filed on December 10, 1973, by the Union alleging that the Company had engaged in, and was engaging in, unfair labor practices within the meaning of Sections 8(a)(1), (3) and (5) of the Act, which respectively make it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them in Section 7 of the Act; to discriminate in regard to hire or tenure of employment or any terms or condition of employment to discourage membership in any labor organization; and to refuse to bargain collectively with the designated representatives of its employees. Following investigation of the charges, the Regional Director concluded that there was reasonable cause to believe that the Company was engaging in the unlawful conduct as charged. On January 8, 1974, the Regional Director issued a complaint pursuant to Section 10(b) of the Act alleging that the Company had violated and was violating Sections 8(a)(1), (3), and (5) of the Act. (A. 3). The complaint was later amended on January 25 and February 15, 1974. On various dates between March 5, and March 21, 1974, a hearing on the matters alleged in the complaint was held before an Administrative Law Judge of the Board. 3/

3/ On June 18, 1974, the Administrative Law Judge issued his decision in the subject unfair labor practice case, finding and concluding that the Employer violated Sections 8(a)(1), (3) and (5) of the Act substantially as alleged in the General Counsel's Complaint. The case is now pending before the Board on exceptions filed by the Company and limited exceptions filed by Counsel for the General Counsel to the Judge's decision pursuant to Section 102.46 of the Board's Rules and Regulations. For the information of the Court, we are submitting herewith four copies of the Administrative Law Judge's decision.

On March 13, 1974, the Regional Director filed with the court below a petition for a temporary injunction, pursuant to Section 10(j) of the Act. (A. 2-14). The Company thereafter filed an Answer in substance denying that the Board had reasonable cause to believe that the Act was being violated and that injunctive relief was warranted. (A. 15-17). The parties stipulated that the record of the proceedings in the court below would consist of the transcript and exhibits of the hearing before the Administrative Law Judge (A. 84-6). The parties then filed briefs on the evidence and law with the court below. Thereafter, upon findings of fact and conclusions of law duly made, the court below entered the order from which the Board now appeals.

The evidence adduced in the hearing before the Board's Administrative Law Judge and stipulated to in the court below and admissions in the Company's answer to the petition may be summarized as follows:

A. The Organizational Campaign of the Union

The Company maintains its principal office, place of business, and warehouse at North Manning Boulevard and Prospect Avenue, Albany, New York, where it is engaged at that location and at various other locations in Albany, New York, in the wholesale and retail grocery business. The Company's Albany warehouse is its only facility involved in this proceeding. (A. 4, 15).

Because of a general dissatisfaction about wages and working conditions, including, among other things, the Company's decision to eliminate its sick leave program in early 1973,[4/] employee James Dillenbeck

4/ Unless otherwise specified, all dates mentioned below occurred in 1973.

and two other employees met on August 23 and decided to ask the other employees about whether they would be interested in joining a union (TR. 12-17). As a result, these three employees began asking other employees about their interest in joining a union, and a consensus was found that the employees were interested in joining a union in general, and Teamsters Local 294, in particular (TR. 16-17).

On August 29, a meeting was held at the Union hall with Mike Robilotto, the president of the Union, and nineteen warehouse and driver employees. Robilotto explained generally to the employees present that if they wanted the Union to represent the Company's drivers and warehousemen, they would have to get authorization cards signed by a majority of the employees. All nineteen employees at the meeting signed authorization cards clearly designating the Union as their collective-bargaining agent (TR. 17-21; A. 18-19). Dillenbeck and Frank Houk, another employee, left the meeting with blank authorization cards to solicit signatures from the warehousemen and drivers who had not attended the meeting (TR. 21-22; 179). As a result of the solicitations of these two and other Company employees, the Union, by September 4, received signed union authorization cards from 43 of the 49 employees in the bargaining unit (TR. 21-28, 121-122, 179-182, 180-190, 209-211, 280-284, 318-321, 325-326, 360-361, 403, 412-413, 423-428. See also A. 18-20).[5/]

5/ Paragraph 6(P) of the petition for Injunction Under Section 10(j) of the Act alleges that all warehousemen and driver employees of the Company at its warehouse located at North Manning Boulevard and Prospect Avenue with the usual statutory exclusions constitutes an appropriate collective bargaining unit under Section 9(b) of the Act (A. 7). The Company's Answer to the petition admits this allegation of the complaint (A. 15). The parties also agreed that at all times material to this case, there were 49 employees in the unit (TR. 30-31).

B. The Company's Efforts to Destroy Support for the Union

On September 4, Union President Robilotto came to the Albany warehouse at the request of employee James Dillenbeck, where both of them met with Company President Isadore Tabachneck (TR. 28-30). Robilotto informed Tabachneck that the Union had 43 cards signed by the warehouse and drivers indicating their desire to be represented by the Union, asked for recognition of the Union, and offered to have a neutral third party check the cards and signatures against the Company payroll (TR. 30). Tabachneck refused recognition, arguing that he had the right to apply to the Board for an election. He also indicated that he would contact his lawyer and petition for an election (TR. 30).

On September 5, Company Vice-President Samuel Tabachneck called a meeting of all employees in the warehouse including office employees. He stated that he knew the warehousemen and truckdrivers were trying to form a union, and that if in their unionizing attempt they were to call a strike, the strike would put the Company out of business and cause all the employees, including the office employees who had no voice in the matter, to lose their jobs. He concluded by saying that the employees should think about what they were doing to the Company and that things could be worked out without a union, and that he would leave it to the employees' best judgment (TR. 31-34, 123-124, 144, 182-183, 198, 362-363).

Following the meeting, Isadore Tabachneck told employee Raymond Valerio, that he (Tabachneck) was fighting for the rights of his employees and his own rights, that he wanted an election, and that Valerio should try to influence the employees to agree with him. When Valerio refused, Tabachneck said that if the employees voted for a strike, "we weren't going to be friends any more" (TR. 124).

On September 6, Company buyer William Brunelle told Dillenbeck that if Dillenbeck were willing to forget about the Union, that he could talk to Samuel Tabachneck about restoration of sick pay (as discussed supra p. 4), a possible raise for him, the possibility of extended vacation benefits for him, and getting rid of Robert Solomon, the warehouse manager. Dillenbeck rejected these offers from Brunelle, stating that he would not accept any promise of benefits and that he wanted union representation. Brunelle also told Dillenbeck that he could represent the employees in a company union and deal directly with the three Tabachnecks i.e., Isadore, Samuel, Avrum. (TR. 39-43, 34-39).

On September 8, about 39 employees who had signed authorization cards for the Union met at the Union hall and in an effort to obtain union representation, voted unanimously to strike the Company midnight September 9 (TR. 43-50, 125-126, 156, 183, 363, 394). After the meeting, Robilotto arranged a meeting with the Company at the Albany warehouse for later that day. Robilotto, several Union officials, and several employees including Dillenbeck attended the meeting on behalf of the Union. The Company was represented by Isadore, Samuel, and Avrum Tabachneck, the latter being the Company's Treasurer and Personnel Director. Robilotto again offered to have a neutral third party determine the Union's majority representative status, which offer was again refused. Robilotto then mentioned that the employees were going on strike, to which Samuel Tabachneck replied that a strike would harm the Company very much and that if the employees went on strike, he would file a petition for an election with the Board the following Monday. The Company never filed a petition for an election (TR. 50-57).

The strike commenced on September 9. The pickets carried signs stating that the Company employees were "on strike for better wages and benefits, Local 294, Teamsters." All 43 employees who signed authorization cards for the Union went on strike, and all, except one, picketed at some time during the strike. During the course of the strike which lasted for approximately three weeks until September 29, approximately 13 of the employees striking returned to work. (TR. 59, 61, 127, 158, 205-206, 231-232, 263-264, 298-299, 316-317, 325-326, 331, 345, 363, 370-371, 377-378, 394, 397, 398, 415. TR. 404, A. 29).

Each day during the strike, Isadore Tabachneck would come out to the picket line about four or five times per day and speak to the strikers (TR. 61, 127, 306, 363-364). On these occasions, and also at 7:00 A.M. each day when he crossed the picket line to enter the warehouse, Tabachneck told the employees picketing the warehouse that they had "killed his business" and that they might as well go home (TR. 63-53, 127-128, 159, 231-232, 264-265). He also stated that he was going to Florida to live, that he was going to put padlocks on the warehouse, that the strikers would never come back to work again, and that certain of the employees had no seniority anyway (TR. 63-64, 127-218, 159, 264-265, 364).

In addition to these statements made daily to whomever was picketing the warehouse at the time, Isadore Tabachneck directed remarks to several of the pickets individually. On several occasions, he told Dillenbeck that Dillenbeck had no seniority; that Dillenbeck was killing the Company's business, for which the other men hated Dillenbeck; and that Dillenbeck "might as well go home" (TR. 63). On September 28, Tabachneck told Raymond Valerio, the employee whose job function was salvaging damaged

goods for the Company, that Valerio "had been robbing him blind, [that] he never knew he had a partner," and that while he would take back employee Passino after the strike, Valerio would be overpaid at "three cents" (TR. 124-131). Additionally, Tabachneck said that Valerio was cleaning him out, and that Valerio might as well leave since he'd never get back into the warehouse unless over Tabachneck's dead body (TR. 131). Isadore Tabachneck told Donald Engel, a warehouse employee, that "after all this was over," the employees could go visit him at his condominium down in Florida, that the employees would never get back in, and that he couldn't deal with the employees while they were "still out in the street" (TR. 159).

Isadore Tabachneck told Daniel Peasley, Jr., a dairyman employee of the Company, that he (Peasley) lacked enough seniority to get back with the warehouse, and that Tabachneck would not take him back even if Peasley "paid him" (TR. 191). Tabachneck told Gary Deyss, another employee, that Deyss was so far on the bottom of the seniority list that Tabachneck would hire Mrs. Bishop or Mrs. Passino, two women who had never worked for the Company and who were wives of two of the Company's employees, before he would take Deyss back into the warehouse (TR. 206-207, 346-347, 399-400). On September 13 or 14 Tabachneck told employee Charles Ballou that he wanted to thank Ballou for doing him a great favor by striking with the others because Tabachneck would close up the place, go to Florida, and retire (TR. 232). He also told Ballou that he would first board up the door and that would be the end of it; that no one would work (TR. 323).

On four or five occasions during the strike, Isadore Tabachneck told employee Ira Stockwell while Stockwell was picketing that he didn't know what Stockwell was striking and picketing for, that Stockwell had no chance of getting back in, and that before he would let a union in the warehouse, he would padlock the warehouse (TR. 264-265). Tabachneck told employee John Quigley on several occasions that the strike was foolish, that the strike was hurting the strikers as well as the Company, and that the situation was such that only a few of the strikers would be rehired (Tr. 299). On another occasion, Tabachneck asked Quigley why he was striking. When Quigley replied that he was seeking better wages and benefits, Tabachneck told him he should look for another job. When Quigley replied that he was looking for another job, Tabachneck told him that that was good because he probably wouldn't have his job if the employees returned to work after the strike (TR. 318). Tabachneck told employee Fowler Riddick that the employees were foolish in striking, that they would be striking until Christmas, that the Company had suffered a 30 to 40 percent decline in business because of the strike, and that as a result, "he would only need about ten of us, that the rest were fired . . . ." (TR. 364).

On September 13, the Company sent a letter to all striking employees to advise them that if they did not return to work by September 16, the Company would seek permanent replacements (A. 21-2, TR. 118). The parties stipulated, however, that none of the employees who were on the payroll as of September 4 have been permanently replaced (TR. 405-406).

On September 20, the Company sent a letter to all the striking employees to advise them that the Company would cease to pay any part of the Blue Cross-Blue Shield premium for each striking employee due September 29 and again mentioned that it would hire permanent replacements (A. TR. 118). The Company then cancelled the Blue Cross-Blue Shield insurance for the striking employees on September 29 even though the striking employees unconditionally offered to return to work that day. (A. 23-4); TR. 301-304).

On September 29, the striking employees, numbering about 25 at that time, held a meeting at the Union hall to discuss whether to end the strike. They voted to return to work and petition the Board for an election (TR. 66-67, 131-132, 183, 207-208, 232-233). The employees asked Robilotto to meet with the Company and to advise the Tabachnecks of the results of the meeting. A meeting was arranged for 11:00 A.M. that day with Robilotto, several Union officials, Dillenbeck and several employees present for the Union, and Isadore, Samuel, and Avrum Tabachneck present for the Company. Robilotto stated that the employees desired to return to work and petition the Board for an election, and asked if the Company would take the employees back by seniority. After protesting a slowdown of business allegedly caused by the strike, Samuel Tabachneck agreed to take the strikers back by seniority (TR. 67-71, 184). Isadore Tabachneck then told Dillenbeck that Dillenbeck did not have the seniority he thought he had, and that the Company had a letter from Dillenbeck indicating that he (Dillenbeck) had resigned from employment. (TR. 68).[6/] It was agreed

6/ The Company conceded at the hearing that although there was a technical break in Dillenbeck's employment as a result of the letter, the Company did not consider Dillenbeck's tenure of employment broken for purposes of seniority (TR. 69-70).

that all the strikers would report for work at 7:00 A.M., Monday, October 1 (TR. 71).

On that date, the striking employees reported for work and Isadore Tabachneck told them to report to Personnel Director Avrum Tabachneck. Avrum Tabachneck told all the striking employees, who were sent to him in groups of four or five, that they were laid off for lack of work, but would be rehired when work became available (TR. 72-73, 133, 159-163, 184-185, 208-209, 233, 266, 284-285, 331-332, 348-349, 364-365, 371, 378, 394-395, 400-401, 415-417). Also on October 1, the Union petitioned the Board for an election among the Company's warehouse and driver employees (TR. 270-271), which election was subsequently held on December 4.

Meanwhile, on October 8, Isadore Tabachneck telephoned John Robinson, an employee, and told him to report to the warehouse where he wanted to talk to him. When Robinson arrived, Tabachneck told him that the employees went about the strike in the wrong way. After referring to a seniority list, Tabachneck told Robinson that he was far down on the seniority list, "that as far as voting is concerned, we would be voting for our jobs, rather than . . . the Union " (TR. 378-82).

Also on October 8, employee Charles Ballou visited the warehouse when Avrum Tabachneck, in the presence of William (Luke) Brunelle, at this time warehouse manager and an admitted supervisor (Tr. 117, 477), asked Ballou how the strikers felt and how they would vote in the election. Brunelle then asked if Ballou thought that there was any possibility of settling this whole thing without the Union by the employees having their own grievance committee and their own shop steward. Ballou said that he

didn't think so, but could not speak for the other employees (TR. 233-235).

In mid-October, employee Glenn Passino went to the warehouse where he encountered Avrum Tabachneck and warehouse manager Brunelle. Tabachneck and Passino began talking about the Board election and about the employees who returned to work before the end of the strike. Tabachneck told Passino that those strikers not recalled would be recalled in a couple of weeks. Tabachneck then showed him a list of the employees who returned to work prior to the end of the strike and told Passino that the Company had to respect the rights of these employees before those of the strikers. Passino looked at the list and said that out of the approximately 18 listed employees, ten would probably vote for the Union. Tabachneck said he doubted that, and asked Passino how he would vote in the election. When Passino replied that he was undecided, Tabachneck responded: "That's hard to believe because you're headstrong on it" (TR. 211-217).

After this conversation with Avrum Tabachneck, Passino had a conversation with Luke Brunelle in the lunchroom of the warehouse. Brunelle asked Passino: "Why couldn't you do this with a Company union?" Passino replied that a company union would not work, because the Company would give the employees something one week and take it back the following week (TR. 217-218).

Following this conversation, Passino had a conversation with Isadore Tabachneck, at which time Tabachneck referred to the fact that Passino was on welfare, and offered to allow him to work on Sundays filling orders at the warehouse "under the table." Passino refused this offer

stating that Tabachneck would call the welfare office the following Monday, and Passino would be in jail Monday afternoon for working "under the table" (TR. 218-219).

During approximately the third week in October, Avrum Tabachneck called employee John Robinson and asked him to report to the warehouse. When Robinson arrived, Avrum Tabachneck explained to him the changes made in the warehouse, that Brunelle was now supervisor of the warehouse, and that "we solved most of the problem and we're at least 100 percent sure of winning the election." Tabachneck told Robinson that he was one of at least five employees that the Company would like to report for work the following Monday, i.e., October 29. In referring to Dillenbeck, Tabachneck called him a "two-time loser," since, as Avrum Tabachneck stated, he "previously tried to start a union with the police."[7/] Tabachneck then said that at one time he thought Robinson was "part of the initial movement of getting the Union into the warehouse." Robinson denied this allegation, stating that his participation was due only to his desire to have first-hand information regarding the Union. Robinson was rehired by the Company on Monday, October 29 (TR. 382-385).

By letter dated November 1, the Company notified 20 of the strikers who had not been recalled that a permanent reduction in force had occurred and that there was no chance that they would be recalled to active employment. (A. 25, TR. 118).[8/]

7/ Dillenbeck attempted to establish the "PBA" (not otherwise identified) at the Albany Police Department when employed there as a policeman. (TR. 101-102).

8/ The 20 employees so notified were those named in paragraph 1(b)(a) of the Petition for Injunction Under Section 10(j). Since the strike ended, only ten strikers had been recalled as of the time of the hearing below, but seniority was followed in the recall. (A. 29, 67-8).

On November 15, employee Ballou waited at the warehouse to pick up some clothing he had left there. While at the warehouse, Avrum Tabachneck asked if he was going to be at the election, if he was still strong for the Union, and if he would vote in favor of the Union. When Ballou answered that he was, Tabachneck asked him why he favored the Union. Later Tabachneck asked him about the discharged strikers, if he had any idea how they would vote, and if any of them were doubtful about the Union. When Ballou said he could not answer these questions, Tabachneck said: "If you can find a way not to come to the election, I'll keep you in mind," and later that it didn't matter how Ballou voted anyway because there would never be a union in the warehouse (TR. 235-237).

On November 27, Avrum Tabachneck spoke to John Robinson about Robinson's alleged absences from work and tardiness. After explaining why he had been late for work, Robinson asked Tabachneck what were the possibilities of his brother, Robert Robinson, a striking employee not recalled to work, being recalled to work. Tabachneck said that nothing could be done to take back his brother who had been laid off, but that he (Tabachneck) "would feel obligated if [Robert Robinson] didn't show up for the election." Then Tabachneck said that he had previously asked others how John Robinson would vote in the election, without success and that now " . . . I'll ask you point blank, how are you going to vote." John Robinson did not reply to this question. John Robinson did relate this conversation to his brother, who later voted in the election, and who never was recalled to employment by the Company (TR. 385-388).

On November 30, while Dillenbeck, Ballou, and other employees were present at a tavern near the warehouse, Isadore Tabachneck and other officials of the Company entered the tavern and began talking with the employees. Isadore Tabachneck told the employees that the Union was going to lose the election, and told Dillenbeck that he would never be back in the warehouse (TR. 86-87, 239-240). Isadore Tabachneck told Ballou that he (Ballou) may as well try to make a living on the horses now because he would never come back to work for the Company (TR. 86-87, 240). Furthermore, Isadore Tabachneck told Dillenbeck and Ballou that he was not going to worry about Dillenbeck and Ballou after Tuesday, i.e., Tuesday, December 4, the date of the Board election, because "we are going to get you" (TR. 86-87, 240).

The election was held on December 4, with three votes being cast for the Union, 25 votes being cast against the Union, and 19 challenged ballots. The Union filed timely objections to the election which were consolidated for hearing with the underlying unfair labor practice complaint.

C. The District Court's Findings, Conclusions and Order

Upon the foregoing evidence and after consideration of the arguments and briefs of counsel, the court below found "reasonable cause to believe that [the Company] has engaged in, and is likely to continue engaging in, conduct proscribed by Sections 8(a)(1)and (3) of the Act, and that appropriate injunctive relief is just and proper to preserve the issues presently before the Board in the present labor dispute" (A. 71-4).

The Court noted that the petition alleged more than 100 incidents of violations of Section 8(a)(1) of the Act, many of which were supported by testimony of the employees, including threats of plant closure, Company suggestion that the employees form a company union, and interrogation of employees regarding their Union sympathies and how they and their fellow employees intended to vote in the Board election. (A. 68). The court below also found substantial evidence demonstrating violations of Section 8(a)(3) of the Act in the form of discriminatory rehiring practices after the strike. The court found such evidence ". . . more than sufficient to support an injunction requiring the Employer to rehire strikers according to seniority to fill any positions which may be available, until the Board has rendered its decision." (A. 73).[9/]

9/ The court found that for economic reasons, the Company's business dealings had contracted since the strike, with the result that the Company did not require additional employees in its warehouse at the time of the injunction proceedings. Although the Board introduced evidence that the Company normally recalled laid-off employees in order of their seniority (see supra, pp.9-11), the Court declined to order immediate interim reinstatement of the strikers, concluding that such relief "would be an improvident exercise of judicial power while there remains at issue before the Administrative Law Judge the question of whether The Trading Port, prior to the strike, used seniority as a basis for the recall of workers when temporary layoffs took place due to insufficient work" (A. 76). Instead, the court enjoined the Company from engaging in future violations of Sections 8(a)(1) and (3) of the Act, and required future recalls to be made on the basis of seniority (A. 75-6, 80). Subsequently, the Administrative Law Judge found that since 1971, the Company had normally followed seniority in recalling employees from layoff status, and, that the Company had discriminatorily refused to recall the strikers; and he recommended that the Board order their reinstatement (JD, at pp. 39, 48).

The court below, in considering the Board's request for interim relief directing the Company to recognize and bargain with the Union, which had apparently been designated by an uncoerced majority of the Company's employees prior to the commission of the charged unfair labor practices, found that "[t]he predictable results of interrogations by the [Company] and discrimination in rehiring based on union activities, coupled with threats of plant closure, would be to destroy or severely inhibit interest in the Union. By the time the Board issues its order and petitions for enforcement, the order will be futile if the [Company] has succeeded by intervening continued violations of the Act, in frustrating the remedial purposes of a Board order." (A. 74). However, the court refused to order the Company to bargain with the Union pendente lite concluding that ". . . neither the need for a showing of grave impact upon the public interest test . . . nor the test applied by the Second Circuit . . . which requires a showing of irreparable harm or necessity to preserve the status quo, has been met here." (A. 78).

Accordingly, the court below entered its order directing the Company pendente lite in sum, to cease and desist from (1) interfering with, restraining or coercing its warehouse employees in the exercise of the rights granted them by Section 7 of the Act; (2) interrogating its employees concerning their membership in, activities on behalf of, or sympathy for the Union; (3) threatening employees with discharge, plant closure, or other reprisals, or discouraging membership in the Union by any other means; and (4) hiring, after March 18, 1974, any person in positions previously held by the striking employees not

rehired, without first offering such positions to such employees in the order of their seniority (A. 83). Thereafter, on July 29, 1974, the Board filed the instant Notice of Appeal from the order of the court below insofar as the temporary injunction fails to order the Company, pending final disposition of these matters before the Board, to offer the 20 discharged employees immediate and full reinstatement to their former or substantially equivalent positions[10/] and insofar as the temporary injunction fails to order the Company, upon request, to recognize and bargain in good faith with the Union as the exclusive representative of the Company's warehouse and driver employees.

10/ Upon the basis of the Regional Director's continuing investigation of these matters, it appears that after the Administrative Law Judge issued his decision in the unfair labor practice case on June 18, 1974, the Company recalled the 20 strikers who were permanently laid-off on November 1, 1973. As the injunction order prohibits any future discriminatory conduct against these or other employees, the Board does not now press its contention that the court below committed reversible error by refusing to order immediate reinstatement of the strikers.

ARGUMENT

I. TEMPORARY INJUNCTIVE RELIEF UNDER SECTION 10(j) OF THE ACT IS WARRANTED UPON A SHOWING THAT REASONABLE CAUSE EXISTS TO BELIEVE THAT A VIOLATION OF THE ACT, AS CHARGED, HAS BEEN COMMITTED AND THAT SUCH RELIEF IS "JUST AND PROPER"

The Act empowers the Board, upon the filing of appropriate charges, to issue, hear, and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Sections 10(a), (b) and (c) of the Act). A Board Decision and Order is not self-enforcing, i.e., a refusal to comply therewith brings no sanction, and Congress was aware that unfair labor practice proceedings before the Board followed by ultimate review by the courts of appeals under Sections 10(e) and (f) of the Act are protracted and time consuming and that unfair labor practices give, or tend to give, rise to such serious and unjustifiable interruptions to commerce that their continuance, pending disposition by the Board could result in irreparable injury to the purposes of the Act. (S. Rep. No. 105, 80th Cong. 1st Sess., pp. 8, 27; Leg. Hist. LMRA, 414, 433).[11/] As explained in the Senate Report on the bill which became the Act (Ibid.):

> . . . the relatively slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives -- the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices . . . .

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11/ Leg. Hist. denotes the two volume reference to the legislative history of the Labor Management Relations Act of 1947 (G.P.O., 1948).

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearing and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.
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> In subsections (j) and (l) to Section 10 the Board is given additional authority to seek injunctive relief. By Section 10(j), the Board is authorized, after it has issued a complaint alleging the commission of unfair labor practices by either an employer or a labor organization or its agent, to petition the appropriate district court for temporary relief or restraining order. Thus the Board need not wait if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

Accordingly, in order to prevent a frustration of the statutory purpose, pending final disposition of the unfair labor practice charges pending before the Board, Congress provided in Section 10(j) of the Act:

> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

At the same time, in 1947, Congress enacted the companion provision, Section 10(l) (<u>infra</u>, pp.59), providing for similar

injunctions with respect to certain specified unfair labor practices such as secondary boycotts. As this Court has recently held, the basic statutory schemes of Sections 10(j) and 10(l) differ in only one respect: 10(l) imposes on the Board a mandatory duty to seek injunctive relief whenever a complaint is to be issued alleging unfair labor practices covered by that Section; whereas, 10(j) gives the Board discretion to seek injunctive relief when a complaint is issued involving other unfair labor practices. Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F. 2d 1230, 1242 (C.A. 2, 1974). Accord: Minnesota Mining & Manufacturing Co. v. Meter, 385 F. 2d 265, 259, n. 5 (C.A. 8, 1967); Boire v. International Brotherhood of Teamsters, 479 F. 2d 778, 787, n. 7 (C.A. 5, 1973).

Together, Sections 10(j) and (l) of the Act embody the determination of Congress that unfair labor practices may give rise or tend to give rise to such serious and unjustifiable interruptions to commerce as to require their discontinuance, pending the Board's adjudication on the merits, to avoid irreparable injury to the policies of the Act and frustration of the statutory purpose which otherwise would result. The injunctive relief contemplated is interlocutory to the final disposition of the unfair labor practice matters pending before the Board and is limited to such time as may expire before the Board renders its final decision.

The issues before a district court in proceedings under Sections 10(j) and 10(l) is whether there is reasonable cause to believe that a violation of the Act, as charged, has been committed, and whether injunctive relief is "just and proper." Angle v. Sacks, 382 F. 2d 655,

661 (C.A. 10, 1967). McLeod v. Compressed Air Foundation, etc. Workers Local 147, 292 F. 2d 358, 359-361 (C.A. 2, 1961); Douds v. International Longshoremen's Association, 241 F. 2d 280, 285 (C.A. 2, 1957). With respect to factual issues ". . . the evidence need not establish a violation. It is sufficient . . . if there be any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a violation had occurred." Madden v. Hod Carriers, Local 41, 277 F. 2d 688, 692 (C.A. 7, 1960), cert. denied 364 U.S. 863. Accord: Douds v. Milk Drivers & Dairy Employees Union, 248 F. 2d 534, 537 (C.A. 2, 1957); Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, supra, 494 F. 2d at 1245 (C.A. 2, 1974); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F. 2d 541, 546 (C.A. 9, 1969). With respect to legal issues, "the district court should be hospitable to the views of the General Counsel however novel: (Danielson v. Joint Board, supra); for "the Board, rather than the district courts, remains the 'primary fact finder' and 'primary interpreter of the statutory scheme,' subject to judicial review by a court of appeals pursuant to Sections 10(e) and (f)[of the Act]." McLeod v. National Maritime Union (Prudential Grace Lines, Inc.), 457 F. 2d 490, 494 (C.A. 2, 1972), citing both McLeod v. Local 25, IBEW, 344 F. 2d 634, 638 (C.A. 2, 1965), and Schauffler v. Local 1291, International Longshoremen's 292 F. 2d 182, 188. (C.A. 3, 1961). Although in Danielson v. Joint Board, supra, the court held that a district court should deny injunctive relief "when, after full study the district court is convinced that the General Counsel's legal position is wrong," prior decisions of the Second Circuit make clear that judicial decisions which are adverse to the Board's

position, or disagreement by the district court with that position, do not alone negate "reasonable cause." Douds v. Milk Drivers & Dairy Employees Union, supra, 248 F. 2d at 538; McLeod v. National Maritime Union and Commerce Tankers Corp., 457 F. 2d 1127, 1133 (C.A. 2, 1972); McLeod v. Local 282, Teamsters, 345 F. 2d 142, 145 (C.A. 2, 1965); Kaynard v. Independent Routemen's Association, 479 F. 2d 1070 (C.A. 2, 1973); McLeod v. A.F.T.R.A., 234 F. Supp. 832, 838 (S.D.N.Y., 1964) aff'd. 351 F. 2d 310 (C.A. 2, 1965). See also, McLeod v. Security Guards and Watchmen's Union, 333 F. Supp. 768, 770-771 (S.D.N.Y., 1971); McLeod v. Local 32-E, Building Service Employees Union, 227 F. Supp. 242, 245-246 (S.D.N.Y., 1964).

The district court is not called upon to resolve issues of credibility; rather, the function of the district courts with regard to issues of credibility raised by the evidence presented is limited to a determination of whether such issues could ultimately be resolved by the Board in favor of the petitioner (i.e., the Board's General Counsel); and the court need not find a probability that the issues will be so resolved by the Board. San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F. 2d 541, 546 (C.A. 9, 1969); Accord: Balicer v. International Longshoremen's Association, 364 F. Supp. 205, (D.N.J., 1973); aff. 491 F. 2d 748 (C.A. 3, 1973); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 459, 463 (N.D. Ohio, 1962); Elliot v. DuBois Chemicals, Inc., 201 F. Supp. 1, 2 (N.D. Texas, 1962); Greene v. Building Trades Council, 165 F. Supp. 902, 904 (N.D. Maine, 1958); Jaffee v. Henry Heide, Inc., 115 F. Supp. 52, 57 (S.D.N.Y., 1953). Therefore, this Court recently stated in Danielson v. Joint Board, supra, 494 F. 2d at 1245:

> When "reasonable cause to believe" turns on disputed issues of fact, the Regional Director may assume these in favor of the charge and the district court should sustain him if his choice is within the range of rationality. If differing inferences may fairly be drawn from the facts he has found, he may choose the one more favorable to the charging party, and this too should be upheld.

In these circumstances, the propriety of injunctive relief in Section 10(j) cases turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy. Where Congress sets the standards for the issuance of injunctions, those standards, and no others, need be satisfied to sustain the prayer for injunctive relief. Douds v. International Longshoremen's Association, 242 F. 2d 808, 811 (C.A. 2, 1957); McLeod v. National Maritime Union, 457 F. 2d 490, 496 (C.A. 2, 1972); Brown v. Pacific Tel. & Tel. Co., 218 F. 2d 542, 544-45 (C.A. 9, 1954). And the prevailing weight of judicial authority, as set forth in the decisions of four circuit courts of appeals, holds that such relief "is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absence of such relief." Wilson v. Milk Drivers and Dairy Employees Union, 491 F. 2d 200, at 203, (C.A. 8, 1974), citing that Court's earlier decision in Minnesota Mining & Manufacturing Co. v. Meter, supra;[12/] International Union, UAW

12/ Wilson v. Milk Drivers and Dairy Employees Union, supra, involved a proceeding under Section 10(l) of the Act in which that court of appeals reversed the district court's denial of injunctive relief. However, the court made clear by its citation of Minnesota Mining & Manufacturing Co., supra, that the standards for injunctive relief are, as noted, supra, p. 22 , the same under both Sections 10(j) and 10(l), the distinction being, as the Court of Appeals for the Ninth Circuit (continued)

v. N.L.R.B. (Ex-Cell-O Corp.), 449 F. 2d 1046, 1051 (C.A.D.C., 1971); Angle v. Sacks, supra, 382 F. 2d at 659-60; N.L.R.B. v. Aerovox Corp., 389 F. 2d 475, 477 (C.A. 4, 1967). See also Brown v. Pacific Tel. & Tel. Co., supra, 218 F. 2d at 544-45; Kaynard v. Bagel Bakers Council, 57 CCH Lab. Cas. Para. 12,499 (E.D.N.Y., 1968).

As held in Angle v. Sacks, supra, the legislative history of Section 10(j) neither declares nor suggests that "section 10(j) relief should be limited to those emergencies endangering the national welfare, or to situations with 'heavy and meaningful repercussions,' or to situations that have a demonstrably prejudicial impact on the public." Rather, the concern of Congress was that the purposes of the Act "could be defeated in particular cases by the passage of time." Thus, "when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, temporary relief may be granted under Section 10(j). Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board." (382 F. 2d at 659-60). The district court is not required to "balance the equities" for "Congress

12/ (continued) held in Retail Clerks Union v. Food Employers Council, Inc., 351 F. 2d 525, 531 (C.A. 9, 1965), that "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor management relations and threaten such degree of harm to the public that they should be enjoined whenever a district court has been shown reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction." (Emphasis in original) (491 F. 2d at 203).

substantially struck the balance when it wrote Section 10(j), leaving particular implementations mainly for the Board's administrative judgment" McLeod v. General Electric Co., 257 F. Supp. 690, n. 15 (S.D.N.Y., 1966), rev'd. 366 F. 2d 847 (C.A. 2), stay granted 87 S. Ct. 5, rev'd. on other grounds 385 U.S. 533.

Therefore, while preservation or restoration of the status quo, and direct evidence of loss of union support in refusal to bargain cases, are appropriate considerations under Section 10(j), neither factor is an essential prerequisite to injunctive relief, "if the circumstances of the case create a reasonable apprehension" (Angle v. Sacks, supra) that the Union's position will be undermined, or its strength will be eroded during the course of litigation before the Board. See, e.g., LeBus v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702 (W.D. La., 1963), cited with approval by the District of Columbia Circuit in International Union, UAW v. N.L.R.B., supra, 449 F. 2d at 1052, n. 26, and by the Eighth Circuit in Minnesota Mining & Mfg. Co. v. Meter, supra, 385 F. 2d at 271, in which the district court enjoined an employer from refusing to bargain with a newly certified union, pending litigation of the unfair labor practice case before the Board.[13/]

13/ In LeBus v. Manning, the district court held that "the very fact that the Respondent is admittedly refusing to bargain with the Union is the type of action which inevitably undermines the Union's status quo and leads to, or tends to lead to, labor disputes and strikes." (218 F. Supp. at 706). In Minnesota Mining & Mfg. Co. v. Meter, supra, the court, although holding that on the facts in the case before it no injunction was warranted, nonetheless cited with approval LeBus v. Manning and the following additional cases in which injunctive relief, consisting in whole or in part of a bargaining order, was in the words of the Eighth Circuit, "necessary either to preserve the status quo or to prevent frustration of the basic remedial purpose of the Act": Brown v. Pacific Telephone & Telegraph Co., supra, 218 F. 2d at 544; Reynolds v. Curley Printing Co., 247 F. Supp. 319, 323-24 (M.D. Tenn., 1965); Rains v. East Tennessee Packing Co., 240 F. Supp. 770, 777 (E.D. Tenn., 1965).

In McLeod v. General Electric Company, supra, this Court referred to general equitable criteria and held that before an injunction could be issued under Section 10(j) of the Act, the Board had to demonstrate that an injunction was necessary to preserve the status quo or to prevent irreparable harm. 366 F. 2d at 850. In General Electric, this Court reversed a district court's grant of a temporary injunction under Section 10(j) of the Act against the refusal of General Electric to negotiate with a union committee composed in part of persons who were affiliated with other unions which also maintained bargaining relations with General Electric. Rejecting the claim of General Electric that this was a union coalition committee and that the Company was not obligated to bargain on a coalition basis, the district court found reasonable cause to believe that the Board would hold the refusal of General Electric to meet with its employees' selected representatives and its attempt to dictate selection of their representatives to be violative of the Act, and that a temporary injunction under Section 10(j) was appropriate to afford "swifter corrective action than the normal process of Board adjudication and Court enforcement." 257 F. Supp. 690, 708-709. The Court of Appeals, without disturbing the findings of the lower court, reversed on the grounds that an injunction was not necessary to preserve the status quo, and that on so novel a question of law, the Board should have, instead of seeking an injunction, expedited its own regular hearing procedures. 366 F. 2d 847, at 850.

Mr. Justice Harlan granted a stay of the Court of Appeals judgment pending certiorari proceedings. He concluded that "in light of the District Court's findings of fact, which were not disturbed by

the Court of Appeals, petitioner's position as to [the standards governing the application of Section 10(j)] cannot be deemed insubstantial" (87 S Ct. 5). Thereafter, while the case was pending on the petition for certiorari, the company and union bargained with the alleged "coalition committee" and they agreed upon a three year collective bargaining agreement to replace the expired contract. The Supreme Court then dissolved the stay granted by Mr. Justice Harlan, granted certiorari, and set aside the judgment of the Court of Appeals with directions to enter a new judgment setting aside the order of the district court and remanding the case to that court for such further proceedings as might be appropriate in light of the supervening event (385 U.S. 533).

Although the Supreme Court did not decide the proper standard for injunctive relief in proceedings under Section 10(j), the Court indicated, by granting certiorari and setting aside the judgment of the Court of Appeals, that it did not intend the decision of this Court to stand as precedent. Cf. United States v. Munsingwear, 340 U.S. 36, 38-40; Sears Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970). As shown, subsequent decisions of four courts of appeals have agreed with the Board that the propriety of injunctive relief in these cases turns not upon the criteria involved in litigation between private parties, but rather upon whether such relief is warranted to prevent frustration of the remedial purposes of the Act. N.L.R.B. v. Aerovox Corporation, supra, 389 F. 3d at 477 (after Court of Appeals for Fourth Circuit equated standards governing relief under Sections 10(j) and 10(e), it noted that ". . . standards governing the application of 10(e), which involves the public interest, cannot be fashioned upon principles pertaining to

equitable relief in private controversies"); Minnesota Mining and Manufacturing Co. v. Meter, supra, 385 F. 2d 265 at 272. ("We agree with the Board's position that under appropriate circumstances, where the public interest is affected, ordinary, equitable standards governing private interests may not control the allocation of temporary injunctive relief"); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW v. N.L.R.B., supra, 449 F. 2d at 1051 ("Since the Government is not required to make a showing of irreparable injury when it seeks an injunction to give effect to an Act of Congress in order to obtain temporary relief under 10(j) or 10(l), the Board need only establish that there is reasonable cause to believe that the Act has been violated, and that remedial purposes of the law will be served by pendente lite relief."); Angle v. Sacks, supra, 382 F. 2d at 660 ("Congress imposed no readily identifiable limitation on the Board's discretion to seek temporary relief under Section 10(j) and the Board may seek such relief if the "circumstances call for such relief").

In addition, the Supreme Court has held that the right of the government to equitable relief is not to be tested by the same criteria applicable to private equity suits. The Supreme Court has held that the ". . . peaceable settlement of labor controversies . . . is a matter of public concern" and that . . . [c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginia Railway Company v. System Federation No. 40, Railway Employees Department, 300 U.S. 515, at 552 (1937).

Moreover, the standards for Section 10(j) relief set forth by this Court in General Electric were, for the most part, expressly rejected by Congress when it adopted Sections 10(j) and 10(l). Opponents had argued that these provisions would revive the evils of the labor injunction and inject the federal courts into the merits of unfair labor practice cases -- thereby impairing the Board's exclusive jurisdiction -- and that they were unnecessary because the Board, adequately funded, could conduct administrative proceedings with sufficient expedition, and then petition the courts of appeals for temporary relief pending review of the Board's order. S. Rep. No. 105, 80th Cong., 1st Sess., Part 2, pp. 18-19 (minority views). Congress thought otherwise. It concluded that adequate protection against abuse of the injunctive remedy was afforded by empowering only the Board, and not a private party, to seek relief[14/]; and that, even when expedited, the administrative procedure prescribed by the Act--involving complaint, hearing before a trial examiner (now called "administrative law judge") appeal to the Board, Board decision and order, and enforcement by the court of appeals--was frequently too slow to prevent frustration of the Act's central purposes. (S. Report No. 105, supra, at 20 [15/]).

14/ See 93 Cong. Rec. 4834-4837 (debate on, and rejection of, amendment which would have permitted private parties to seek injunctive relief); Amazon Cotton Mill Company v. Textile Workers Union, 167 F. 2d 183 (C.A. 4, 1948).

15/ Although this court in General Electric stated that it is not inclined to affirm a grant of an injunction because ". . . the Board's procedures may be slow and tortuous" (366 F. 2d 847, at 850) and that the Board, instead of seeking an injunction, should have expedited its own proceeding, Congress, in enacting both Section 10(j) and 10(l) determined that because the Board's procedures and the procedures governing the enforcement of its orders may be slow and tortuous, temporary injunctive relief under these sections was necessary to insure that persons violating the Act could not accomplish their unlawful (continued)

Congress also expressly rejected the model of the Norris-LaGuardia Act (29 U.S.C. 101, et seq.) under which the standard for injunctive relief is quite similar to that applied by this Court in General Electric. Section 7 of the Norris-LaGuardia Act provides in pertinent part that a temporary or permanent injunction may not be issued unless it is shown that (1) "substantial and irreparable injury to complainant's property will follow;" (2) "as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and (3) "complainant has no adequate remedy at law." 29 U.S.C. 107 (c), (d), and (e). At the time that the Senate was considering enactment of Sections 10(j) and 10(l) of the Act, the Senate had before it a proposal by Senator Ball which would have modified what is now Section 10(l) by inter alia ". . . leav[ing] in effect Section 7, exclusive of clauses (c) and (e) of the Norris-LaGuardia Act." 93 Cong. Rec. 5036, 2 Leg. Hist. 1348. Thus, under this proposal, Section 7 of the Norris-LaGuardia Act would have been applicable in Section 10(l) proceedings including the requirement that "substantial and irreparable" injury be shown, except for those provisions of the Norris-LaGuardia Act requiring that (1) ". . . as to each item of relief granted, greater

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15/ (continued) purpose before being placed under an enforced Board order. See supra, pp. 21 ; see also Kaynard v. Bagel Bakers Council, supra, 57 CCH Labor Reports Para. 12,499, where the District Court for the Eastern District of New York held that: "In summary, General Electric fairly read, authorizes access to this Court for the grant of 10(j) relief to those lesser enterprises and groups of employees who must otherwise await without preferential consideration the routine calendaring of their controversies by the Board and yet are able to demonstrate that an injunction is necessary to preserve the status quo [ante] or to prevent any irreparable harm."

injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;" and (2) "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." After discussion and debate, the Senate overwhelmingly rejected Senator Ball's proposed amendment by a vote of 62 to 28 (93 Cong. Rec. 5058; 2 Leg. Hist. 13701), adopting instead that section of the committee bill (5.1126, 1 Leg. Hist. 129) which continued in effect Section 10(h) of the Act, providing that: "When granting appropriate temporary relief of a restraining order . . . the jurisdiction of courts sitting in equity shall not be limited" by the Norris-LaGuardia Act. See also, Building & Construction Trades Council v. Alpert, 302 F. 2d 594, 596-599 (C.A. 1, 1962).

Since as shown above, supra, pp. 22 , no relevant distinction exists between Section 10(l) and Section 10(j), Congress, in enacting these sections of the Act and reenacting Section 10(h), rejected the traditional standards for injunctive relief and determined that the temporary injunction was an allowable and appropriate means of promptly checking unfair labor practices.[16/]

In light of the foregoing, including the Supreme Court's disposition of General Electric, and the weight of judicial authority as represented by the subsequent decisions of four courts of appeals, we respectfully submit that General Electric states an incorrect standard for

16/ See also Report of the Subcommittee on National Labor Relations Board of the House Committee on Education and Labor, 87th Congress, 1st Session where the Report of the Subcommittee, far from adopting a narrow view respecting the role of Section 10(j), criticized the Board for not utilizing that remedy more extensively. Committee Print, pp. 50-52. And see the observation of Judge Friendly in N.L.R.B. v. Superior Fireproof Door & Sash Co., Inc., 289 F. 2d 713, 723, n. 6 (C.A. 2, 1961).

injunctive relief in Section 10(j) proceedings and should not be adhered to by this Court. Moreover, in General Electric this Court bottomed its decision on its view of the underlying issue there as a novel issue and on its view that since the union's bargaining committee was allegedly a coalition committee, the union therein was changing the traditional bargaining pattern so that any injunction would result in a change rather than maintain the status quo. As we demonstrate, infra at pp. 36-48 the instant case is factually distinguishable from General Electric in three significant respects: (1) the propriety of a bargaining order on the facts of this case does not present a novel issue of law, but is governed by settled principles enunciated by the Supreme Court in N.L.R.B. v. Gissel Packing Co., 395 U.S. 515 (1969); (2) the injunctive relief sought here is directed to a preservation or restoration of the status quo which was affected by the Company's unlawful conduct; specifically, restoration of the Union's majority status as bargaining representative which existed prior to the Company's commission of the unfair labor practices and (3) irreparable harm will result in the instant case if the requested injunctive relief is not granted.

With respect to appellate review of 10(j) proceedings, this Court has held that the district court's findings of fact are reviewable under the "clearly erroneous" standard. Danielson v. Joint Board, supra, 494 F. 2d at 1244-1245. However, the district court's denial of a bargaining order was not based on a proper exercise of statutory discretion, but, was based upon its failure to recognize and correctly apply the applicable standards in a Section 10(j) proceeding and upon its consequent erroneous

legal conclusion that such relief could not be granted in a Section 10(j) proceeding. Therefore, the district court's denial of a bargaining order should be reversed if this Court finds that the circumstances of this case create a reasonable apprehension that the remedial purposes of the Act will be frustrated in the absence of such relief. Brown v. Pacific Tel. & Tel. Co., supra, 218 F. 2d 542; Douds v. International Longshoremen's Ass'n., supra, 242 F. 2d at 811 (C.A. 2, 1957). See also Boire v. Teamsters, supra, 479 F. 2d at 793 and n. 15, and cases cited therein, including the decision of this Court in McLeod v. National Maritime Union and Commerce Tankers Corp, supra, 457 F. 2d at 1133-34.

II. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN FAILING TO CONCLUDE THAT AN INJUNCTION DIRECTING THE COMPANY TO RECOGNIZE AND BARGAIN WITH THE UNION PENDING LITIGATION OF THE UNFAIR LABOR PRACTICE CHARGE BEFORE THE BOARD WAS JUST AND PROPER.

A. The court below properly found reasonable cause to believe that the Company engaged in extensive unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act.

The district court's findings (supra, p. 16) of reasonable cause to believe that the Company engaged in extensive violations of Sections 8(a)(1) and (3) of the Act, are not at issue on this appeal. However, as those findings are material to our position that (1) there is reasonable cause to believe that the Board will issue a remedial bargaining order in this case, and (2) that injunctive relief in the form of a bargaining order is just and proper, we shall briefly demonstrate that the applicable law fully supports those findings.

(1) The Violations of Section 8(a)(1)

The court below properly found reasonable cause to believe that the Company was engaging in conduct violative of Section 8(a)(1) by encouraging employees to form an employee grievance committee to deal directly with the Company rather than through the Union; promising economic benefits to employees if they abandoned the Union or if they returned to work before their strike ended; threatening to close its warehouse as a reprisal against its

employees for engaging in a strike and other union activities; requesting employees to influence other employees to agree with the Company's opposition to the Union in the warehouse; coercively interrogating its employees regarding their sympathies toward the Union and how they or their friends intended to vote in the scheduled Board election; promising employees to take them back out of seniority if they could induce other employees with less seniority to stop striking and to return to work; and threatening to close its warehouse or take other reprisals against its employees if they chose a collective bargaining representative. Company President Isadore Tabachneck, together with Vice-President Samuel Tabachneck, Personnel Manager Avrum Tabachneck, and Warehouse Manager William Brunelle persistently attempted to pry into employee union activities and sympathies, while indicating total and complete opposition to the Union and stating that unionization of the warehouse would lead to a permanent closing of the warehouse. 17/

17/ This Court and other Courts of Appeals have held that the activities engaged in by the Company in this case plainly constitute the kind of unlawful coercion and restraint proscribed by Section 8(a)(1) of the Act:

(a) Threatening employees with the loss of their jobs if they selected a union. N.L.R.B. v. Hendel Manufacturing Company, 483 F.2d 350 (C.A. 2, 1973); N.L.R.B. v. Scoler's, Inc., 466 F.2d 1289 (C.A. 2, 1972); N.L.R.B. v. Gladding Keystone Corp., 435 F.2d 129 (C.A. 2, 1970); N.L.R.B. v. River Togs, Inc., 382 F.2d 198 (C.A. 2, 1967); N.L.R.B. v. Fitzgerald Mills, 313 F.2d 260 (C.A. 2, 1963), cert. den. 375 U.S. 834 (1963). (Cont'd)

(2) The Violations of Section 8(a)(3).

The court below properly found reaasonable cause to believe that the Company violated Section 8(a)(3) of the Act by discriminatorily selecting ten certain employees for reinstatement after the strike ended and by the November 1 terminating of 20 adherents of the Union. It is settled that an employer may not prefer or discriminate in favor of nonstrikers over strikers

17/ (Cont'd)

(b) Promising economic benefits if employees forgot the Union. N.L.R.B. v. Scoler's, Inc., supra; N.L.R.B. v. A & S Electronic Die Corp. 379 F.2d 211 (C.A. 2, 1967), cert. den. sub. nom. Joint Industry Board of Electrical Industry v. U.S., 391 U.S. 224 (1968); N.L.R.B. v. Philamon Laboratories, Inc., 298 F.2d 176 (C.A. 2, 1962) cert. den. 370 U.S. 919 (1962).

(c) Promising employees positions in a company union and encouraging employees to form a company union. N.L.R.B. v. Hendel Manufacturing Company; N.L.R.B v. Int'l. Metal Specialties, Inc., 433 F.2d 870 (C.A. 2, 1970); N.L.R.B. v. Patent Trader, Inc., 415 F.2d 190 (C.A. 2, 1969); L. C. Cassidy & Son, Inc. v. N.L.R.B., 415 F.2d 1358 (C.A. 7, 1969).

(d) Threatening employees that they would never be taken back if they struck the company. N.L.R.B. v. May Aluminum, Inc., 398 F.2d 47 (C.A. 5, 1968); Dayton Food Fair Stores, Inc. v. N.L.R.B., 399 F.2d 153 (C.A. 6, 1968), cert. den. 393 U.S. 1085 (1969); N.L.R.B. v. Tommy's Spanish Foods, Inc., 463 F.2d 116 (C.A. 9, 1972).

(e) Threatening to discharge employees if they struck. Wagner Transportation Co. v. N.L.R.B., 424 F.2d 628 (C.A. 6, 1970); N.L.R.B. v. Marydale Products Co., 311 F.2d 690 (C.A. 5, 1963), cert. den. 375 U.S. 817 (1963); N.L.R.B. v. Sanitary Bag & Burlap Co., 406 F.2d 750 (C.A. 6, 1969); Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d 466 (C.A. 9, 1966).

(f) Coercively interrogating employees. N.L.R.B. v. Scoler's, Inc., supra; Bourne v. N.L.R.B., 332 F.2d 47 (C.A. 2, 1964); N.L.R.B. v. Lifetime Door Co., 390 F.2d 272 (C.A. 4, 1968); N.L.R.B. v. Louisiana Mfg. Co., 374 F.2d 696 (C.A. 8, 1967); N.L.R.B. v. A & P Tea Co., 346 F.2d 936 (C.A. 5, 1965); Cf. N.L.R.B. v. Dorn's Transportation Co., 405 F.2d 706, 713-14 (C.A. 2, 1969) (interrogation unlawful if threatening or in a context of employer discrimination and indication of fear of reprisal).

(Cont'd)

after a strike has ended even if an economic contraction of business necessitates a layoff of some employees. N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375 (1967); N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Erie Resistor Corp. v. N.L.R.B., 373 U.S. 221 (1963).[18] The court below was warranted in finding that the evidence was more than sufficient to demonstrate that the Company should be required to rehire strikers according to their seniority (A. 73), which, of course, the Company did not do, although it had promised to do so during the September 29 meeting (Tr. 61-71, 184). Rather, the Company recalled only those

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17/ (Cont'd)

(g) Promising to give those striking employees priority who returned before the end of the strike. N.L.R.B. v. Fotochrome, Inc., 343 F.2d 631 (C.A. 2, 1965), cert. den. 382 U.S. 833 (1965); N.L.R.B. v. Eastern Packing Co., 416 F.2d 256 (C.A. 3, 1969); N.L.R.B. v. Plastilite Corp., 375 F.2d 543 (C.A. 8, 1967); Packinghouse Workers v. N.L.R.B., 416 F.2d 1126 (C.A.D.C., 1969).

(h) Promising to close a facility before a union would be recognized. N.L.R.B. v. Hendel Manufacturing Company, supra; N.L.R.B. v. Scoler's, Inc., supra; N.L.R.B. v. River Togs, Inc.; N.L.R.B. v. Yokell (Crescent Art Linen Co.), 387 F.2d 751 (C.A. 2, 1967).

18/ Due to the Company's unfair labor practices, the strike beginning on September 9 was an unfair labor practice strike at its inception or at least was prolonged by the Company's unfair labor practices. N.L.R.B. v. Juniata Packing Company, 464 F.2d 153 (C.A. 3, 1972); N.L.R.B. v. Fitzgerald Mills Corporation, 313 F.2d 260, at 269 (C.A. 2, 1963) cert. den. 375 U.S. 834. Accordingly, "striking employees do not lose their status and are entitled to reinstatement . . . even if replacements for them have been made." Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278 (1965). See also Colecraft Mfg. Co., Inc. v. N.L.R.B., 385 F.2d 998, 1005 (C.A. 2, 1967). Assuming, arguendo, that the striking employees were at all times during the strike economic rather than unfair labor practice strikers, the reinstatement rights of the strikers would not be affected in this case since the parties' stipulated that none of the strikers had been permanently replaced. (Tr. 405-406).

(Cont'd)

strikers who had a "good attitude toward the Company" (Tr. 542) and for this determination relied on the opinion of newly appointed warehouse manager Brunelle, a man who had not worked closely with the warehouse personnel during the prior two years (Tr. 569). In effect, the Company's refusal to accord returning strikers full reinstatement rights was inherently destructive of important employee rights and obviously discouraged union membership, especially at a time when a Board conducted representation election was in the offing. N.L.R.B. v. Duncan Foundry and Machine Works, Inc., 435 F.2d 612 at 620 (C.A. 7, 1970); N.L.R.B. v. Anvil Products, Inc., 496 F.2d 94 (C.A. 5, 1974); Great Lakes Carbon Corp. v. N.L.R.B., 360 F.2d 19 (C.A. 4, 1966); Pioneer Flour Mills v. N.L.R.B., 427 F.2d 983 (C.A. 5, 1970), cert. den. 400 U.S. 942 (1970).

18/ (Cont'd)

In the court below, the Company attempted to defend its actions on the ground that a contraction of business occurred after the strike thereby requiring the need for fewer employees. This asserted ground is of no avail for unfair labor practice or economic strikers are entitled to their previous jobs or substantially similar ones, or, if none are available, to be placed upon a priority list for positions which may arise thereafter. Mastro Plastics Corp. v. N.L.R.B., supra; Automobile Workers v. N.L.R.B., 455 F.2d 1357, 1367 (C.A.D.C., 1971); The Laidlaw Corp. v. N.L.R.B., 414 F.2d 99 (C.A. 7, 1969), cert. den. 397 U.S. 920 (1970).

B. An Injunction Directing the Company To Recognize and Bargain With the Union Pendente Lite Is Just and Proper.

As shown (supra, 16), the court below found that the evidence was more than sufficient to demonstrate reasonable cause to believe that the Company was violating Section 8(a)(1) and (3) of the Act. Furthermore, these unfair labor practices were extensive and pervasive, and the court below found that "/t/he predictable results of interrogations by the /Company/ and discrimination in rehiring based on union activities, coupled with threats of plant closure, would be to destroy or severely inhibit interest in the Union." (A. 74). This finding is amply supported by the fact that although some 43 employees signed authorization cards for the Union between August 29 and September 9, the Union received only three votes in the Board conducted election on December 4, after the Company had engaged in its successful campaign to defeat the Union by committing extensive unfair labor practices against its employees. Therefore, as the court below properly found, "/b/y the time the Board issues its order and petitions for enforcement, the order will be futile if the /Company/ has succeeded by intervening continued violations of the Act, in frustrating the remedi[illegible] purposes of a Board Order. This will be particularly so if the Board directs a new election." (A. 74).

However, the court below concluded that an injunction directing the Company to recognize and bargain with the Union was not justified under the circumstances of this case because (1) there was no showing of grave impact upon the public interest; (2) there was no showing of irreparable harm or (3) there was no showing of necessity to preserve the status quo. These standards, we submit, were improperly applied and the Company should have been ordered to recognize and bargain with the Union pending litigation of the unfair labor practice case.

1. The evidence adduced below, and the findings of the district court demonstrate reasonable cause to believe that the Company's unfair labor practices destroyed the Union's majority status and rendered a free and fair election impossible thereby satisfying the standards for issuance of a Board remedial bargaining order.

In N.L.R.B. v. Gissel Packing Co., supra, 395 U.S. 515, the Supreme Court passed upon the propriety of the Board's practice of issuing ". . . a bargaining order as a remedy for a Section 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." 395 U.S. 575, 610. In approving the Board's practice, the Supreme Court expressed its agreement with the holding of the Fourth Circuit that the issuance

of a bargaining order is an appropriate remedy ". . . without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices . . . /which/ . . . are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.'" 395 U.S. 575, 613-614. The Court went on, however, to conclude that:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice' becomes as important a goal as deferring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. 395 U.S. 575, 614-15.

Stated succinctly, Gissel holds that in a situation where an employer refuses to recognize a majority union, and then proceeds to commit independent unfair labor practices which have the tendency of undermining the union's majority status and impeding the election process, the issuance of a remedial bargaining order is warranted.

With respect to the case at bar, the evidence demonstrates that the Union requested recognition in a unit composed of the truckdrivers and warehousemen at the Company's Albany warehouse, a unit which the Company admitted was appropriate for purposes of collective bargaining under Section 9(b) of the Act. The evidence also demonstrated that a majority in the unit, in fact some 43 out of 49 employees in the unit, signed authorization cards designating the Union as their exclusive bargaining representative prior to the Union's request for recognition, and that the Company not only refused to recognize or bargain with the Union, but also that there is reasonable cause to believe that the Company's refusal to bargain was accompanied by an unlawful course of conduct including numerous violations of Sections 8(a)(1) and (3) of the Act.

We submit that the Company's response to the Union's bargaining demand, which consisted of coercive interrogations, threats, promises of benefits, encouragement of the formation of a company union (perpetrated in large measure by Isadore, Samuel, and Avrum Tabachneck, the three principal corporate officers of the Company), together with the discriminatory refusal to reinstate strikers after the strike, demonstrates that the instant case falls not merely within the second class of cases described by the Supreme Court in Gissel, (395 U.S. at 614) as justifying the use of a bargaining order because the commission of such less pervasive "unfair labor practices nonetheless have the tendency to undermine majority strength and impede

the election process," but rather, the instant case presents conduct "so outrageous" and "pervasive" that a bargaining order would be justified without need of inquiry into majority status on the basis of cards or otherwise. See Gissel, supra, 395 U.S. at 614.[19/] Indeed, the circumstances of the instant case are more compelling than the circumstances of the four cases which were consolidated by the Supreme Court in Gissel, and in subsequent cases in which this Court enforced bargaining orders based on similar employer conduct. N.L.R.B. v. Rollins Telecasting, Inc., 494 F. 2d 80 (C.A. 2, 1974), (discharge of two union adherents, threatening to close and telling employees that it was futile to vote for union, promise of benefits); MPC Restaurant Corp. and Hardwicke's Plum Ltd. d/b/a Maxwell's Plum v. N.L.R.B., 481 F. 2d 75 (C.A. 2, 1973) (discharge of four union adherents, coercive interrogations, threats of discharge, promise of benefits); N.L.R.B. v. Scoler's, Incorporated, 466 F. 2d 1289, 1292-1294 (C.A. 2, 1972) (coercive interrogation, threats to punish union adherents and reward union opponents); N.L.R.B. v. International Metal Specialties, Inc., 433 F. 2d 870, at 872 (C.A. 2, 1970), cert. den. 402 U.S. 907 (1971) (threatening loss of benefits and plant closure, encouraging employees to form their own committee, granting a unilateral wage

19/ Compare Sinclair Co. v. N.L.R.B., one of the four cases involved in the Gissel proceeding, in which the Supreme Court affirmed the decision of the First Circuit which had left undistrubed a Board finding that an employer's threats of reprisal were so coercive that, even without a Section 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats. 164 NLRB 261 (1967). In Sinclair, unlike the present case, there were no violations of Section 8(a)(3). Compare also, N.L.R.B. v. L. B. Foster Company, 418 F. 2d 1 (C.A. 9, 1969), enf'g. 168 NLRB 83, 87 (1967), cert. denied 397 U.S. 990; N.L.R.B. v. Wylie Manufacturing Co., 417 F. 2d 192, 196 (C.A. 10, 1969), cert. denied 397 U.S. 913; Retail Store Employees Union Local 880 v. N.L.R.B., 419 F. 2d 329, 336 (C.A.D.C., 1969).

increase);[20] N.L.R.B. v. Pembek Oil Corporation, 433 F. 2d 308, at 309 (C.A. 2, 1970) (discharge of one union adherent, bargaining directly with employees, and later refusing to bargain further because the employees were union-affiliated); N.L.R.B. v. Marsellus Vault & Sales, Inc., 431 F. 2d 933, at 938 (C.A. 2, 1970) (coercive interrogations, threats to close plant, inducing employees to withdraw support of union and form their own union); Byrne Dairy, Inc. v. N.L.R.B., 431 F. 2d 1363, at 1364 (C.A. 2, 1970) (coercive interrogation, threats to deprive employees of fringe benefits and to close the plant.[21]

20/ In International Metal Specialties, the Board found that the Company violated Section 8(a)(1) by threatening the loss of benefits and plant closure if the union should succeed, by a statement that the employees should form their own committee and by granting a unilateral wage increase. As this Court stated: "Indeed, the violations, marginal though they may appear to some, considerably exceeded the violations in Sinclair Co. v. N.L.R.B., . . . one of the cases decided in the Gissel decision, yet the [Supreme] Court in that case affirmed the use of a bargaining order." 433 F. 2d at 873.

21/ Although the court below noted that the Supreme Court granted certiorari in N.L.R.B. v. Teamsters, Local 413, 487 F. 2d 1099 (D.C. Cir., 1973) cert. granted 42 U.S.L.W. 3591 (April 22, 1974) and that this case will further refine the Gissel rule, the present case does not involve the issue to be decided by the Supreme Court. Certiorari was granted on the issue of whether an employer, who has not engaged in conduct that would preclude holding of a fair election, violates his bargaining obligation under the Act by declining to accept the union's authorization card or picket line indication of employee support and instead insists that the union establish its representative status in an NLRB election. In the present case, of course, it is contended that the Company has engaged in conduct that would preclude the holding of a fair election.

Recently, the Board in Steel Fab, Inc., 212 NLRB No. 25, 86 LRRM 1474 (1974) undertook a re-examination of its analytical approach to "Gissel-type" refusal to bargain cases. Prior to its decision in Steel Fab, the Board predicated each Gissel-type bargaining order upon the finding of a Section 8(a)(5) refusal to bargain violation. In Steel Fab, a majority of the Board rejected this analytical approach by concluding that ". . . it is unnecessary to predicate the bargaining order on any 8(a)(5) violation." 86 LRRM 1474, 1476. The majority reasoned that (86 LRRM at 1476):

> Under Gissel, to determine whether or not a bargaining order should issue as part of the remedy, we evaluate the seriousness of the employer's misconduct and its impact on the holding of a fair election (or rerun election). In effect, by issuing a bargaining order, we are remedying an employer's 8(a)(1) violations that have dissipated a union's majority and prevented the holding of a fair election. It serves no real purpose to find additionally a violation of Section 8(a)(5).
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> The central issue in all these cases is, as the Court's opinion in Gissel spells out, the propriety of the Board's use of a bargaining order as a remedy for varying degrees of employer unfair labor practices. We see no point, in cluttering up the analysis of this central issue with the kinds of matters which we customarily consider in deciding whether an employer has or has not met the kinds of bargaining obligations dealt with in our typical refusal-to-bargain 8(a)(5) cases.
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> Henceforth, in these Gissel-type situations, we shall dispense with finding an 8(a)(5) violation and instead determine only whether or not a bargaining order is necessary to remedy the employer's 8(a)(1)'s /and other unfair labor practices./

In essence, Steel Fab holds that a bargaining order under Gissel is not predicated upon a nunc pro tunc finding of a violation of Section 8(a)(5) as of the employer's refusal to bargain, prior to the occurrence of the unfair labor practice which warranted the issuance of a remedial bargaining order, but rather is predicated solely upon the need for such an order within the Gissel standards.

The Board's Steel Fab decision does not nullify or in any way lessen the need for injunctive relief, including a bargaining order, in the instant case. As the Board stated (86 LRRM at 1476):

> We are therefore not departing one iota from any teaching of Gissel with respect to the scope of the Board's authority to enter bargaining orders as a remedy for employer unfair labor practices, nor from the standards set forth therein outlining the categories of cases in which such a remedial order is appropriate. Instead, we are simply removing from the analytical process involved in applying those standards a semantic difficulty which we believe has clouded the central issues over the years.

Rather, as we shall show, the absence of a retroactive Section 8(a)(5) finding by the Board makes all the more necessary interim injunctive relief in the form of a prospective interim bargaining order, based on a finding of reasonable cause after the operative facts (here, the Section 8(a)(1) and (3) conduct) have occurred.

2. The Injunction Requested Is Just and Proper To Prevent Frustration of the Basic Remedial Purposes of the Act, To Prevent Irreparable Harm and To Preserve the Status Quo.

As shown, supra, pp.20-35, the weight of judicial authority holds (and we submit, correctly), that injunctive relief is just and proper where reasonable cause exists to believe that unfair labor practices have been committed and where the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absence of such relief. As indicated, this Court has held that injunctive relief is not just and proper unless it is demonstrated that an injunction is necessary to preserve the status quo or prevent irreparable harm. McLeod v. General Electric Co., supra, 366 F.2d at 850. We submit below that by either of these standards, injunctive relief is here just and proper and that the court below committed reversible error in not so concluding.

There is no limitation in the statute itself which would indicate that district courts were authorized to enjoin certain unfair labor practice conduct to effectuate the remedial purposes of the Act, but that in attempting to remedy flagrant abuses of Sections 8(a)(1) and (3) of the Act by an employer in destroying a union's majority support and rendering a free and fair election impossible, the courts could not issue a bargaining order pending

disposition of the case by the Board. The relevant legislative history of Section 10(j) demonstrates that Congress intended that together, Sections 10(j) and 10(l) would provide for "injunctive relief in the case of all types of unfair labor practices" including those cases where an employer's illegal conduct has destroyed the majority support of a union and rendered a free and fair election impossible "before a final determination of the Board." S. Rep. No. 105, 80th Cong., 1st Sess., supra, p. 21 . See also Minnesota Mining & Mfg. Co. v. Meter, supra, 385 F.2d 265, 269 n. 5. Senator Morse, introducing his amendment which ultimately became Section 10(j) of the Act, stated that "should my proposal become law, it will of course, be necessary for the Board to exercise informed discretion in administering the law to the end that labor and industry will be encouraged to adjust their differences by the peaceful means of collective bargaining." II Leg. Hist. LMRA 985; 93 Cong. Rec. 1912.

Moreover, cases involving an employer's refusal to bargain with a union present particularly appropriate circumstances for the application of Section 10(j) remedial relief. The Supreme Court has pointed out that "enforcement of the obligation to bargain collectively is crucial to the statutory scheme." N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 402 (1952) and "/t/he refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees'

morale, deters their organizational activities, and discourages their membership in unions." Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 704 (1944). And "in the labor field, as in few others, time is crucially important in obtaining relief." N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421, 430 (1967).

In view of the crucial nature of the obligation to bargain to the statutory scheme, courts of appeals have held that interim bargaining orders may be granted, not only to incumbent unions, but also to newly certified unions or to unions which have been designated by the employees as their collective bargaining representatives and then confronted with unfair labor practices by the employer. See International Union, UAW (Ex-Cell-O Corp.), supra, 449 F. 2d at 1050-1051; N.L.R.B. v. Aerovox Corp., supra,[22/] 389 F. 2d 475.

22/ Ex-Cell-O and Aerovox were proceedings for interim injunctive relief under Section 10(e) of the Act, which provides for such relief by a Court of Appeals pending enforcement or review of final Board orders. However, in Aerovox, the Fourth Circuit concluded that the standard was the same for Sections 10(e) and 10(j); and, in Ex-Cell-O, the Court adopted, for 10(e) purposes, the same standard as is applicable in 10(j) proceedings (supra, pp.20-35). Although in each case, the Court found that injunctive relief was not warranted in the particular circumstances, the present case differs materially from those cases. Thus, in Aerovox, the Court found that there were no circumstances (e.g., such as a strike or accompanying unfair labor practices), other than the passage of time, which would indicate that an employer's refusal to bargain with a newly certified union might tend to erode the Union and undercut its strength pending enforcement proceedings. And in Ex-Cell-O, the Court found that Section 10(e) injunctive relief was not warranted in a case which had been pending in litigation for six years, and a considerable part of the delay was attributable to the Union's desire to make a test case on the "make whole" remedy issue. However, the Court made clear that the passage of time should not necessarily render injunctive relief inappropriate, and that Board delay should not be allowed to penalize the employees (449 F. 2d at 1053).

And the district courts have granted such relief to nonincumbent unions. See LeBus v. Manning, Maxwell & Moore, supra, 218 F. Supp. 770, 705-06; Smith v. Old Angus, Inc. of Maryland, 81 LRRM 2941 (D. Md., 1972); Henderson v. Gibbons & Reed, et al., 53 CCH Lab. Cas. Para. 11,081 (D. N.M., 1966); Reynolds v. Herron Yarn Mills, 53 CCH Lab. Cas. Para. 11, 347 (W.D. Tenn., 1966).[23/] Moreover, this Court has, on two occasions, affirmed Section 10(j) orders enjoining charged violations under Section 8(b)(3) of the Act, of a Union's commensurate duty to bargain collectively with the employer of the employees whom it represents. McLeod v. Compressed Air Foundation etc. Workers Local 147, supra, 292 F. 2d 358; Douds v. International Longshoremen's Association, 241 F. 2d at 285.

The facts of the instant case demonstrate the need for a temporary injunction requiring the Company to bargain. Over the short space of three months, the Company's flagrant and deliberate conduct succeeded in shrinking the Union's nearly unanimous support to virtual nothingness. The Union and the employees are relegated to this detrimental position simply because the Company unilaterally and illegally resolved the question concerning representation of the employees by destroying

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23/ The district courts have also granted such relief to incumbent unions. See, e.g. Kaynard v. Bagel Bakers Council, supra, 57 CCH Lab. Cas. Para. 12,499; Sachs v. Davis & Hemphill, 295 F. Supp. 142 (D. Md., 1969); Humphrey v. Retired Persons Pharmacy, 84 LRRM 2599 (D. D.C., 1973).

the Union's organizational campaign through a pernicious unfair labor practice campaign. Thus, when and if a bargaining order is ultimately enforced in this case, the Company will, in the absence of injunctive relief, bargain with a destroyed Union sapped of its strength by the Company's own illegal campaign, even though there was reasonable cause to believe that numerous and serious violations of Section 8(a)(1) and (3) had occurred and that an enforceable, albeit interim bargaining order, should have issued at any early time. In these circumstances, contrary to the Congressional intent, the Company will have been successful in violating the Act and destroying its employees Section 7 right to select the Union as their collective bargaining representative ". . . before being placed under any legal restraint and thereby . . . mak[ing] it impossible or not feasible to restore or preserve the status quo pending litigation." See S. Rep. No. 105, 80th Cong., 1st. Session, pp. 27; I Leg. Hist. LMRA, p. 433.

The court below itself recognized that "[b]y the time the Board issues its order and petition for enforcement, the order will be futile if the [Company] has succeeded by intervening continued violations of the Act, in frustrating the remedial purposes of a Board order." (A. 74). Moreover, the Steel Fab rationale (supra, pp. 47-8) heightens, rather than mitigates, the need for injunctive relief. During the period of time pending a Board order, not only must the Union maintain its position in an atmosphere of unremedied unfair labor practices, but the Union and the employees must deal with the fact that the Company is free

to make unilateral changes in their working conditions (if not violative of Section 8(a)(1)), without the possibility of a retroactive remedy. In these circumstances the Union faces an all the more difficult task in attempting to retain its support among the employees, and injunctive relief is further warranted.

The court below, in denying affirmative relief held that the entering of interim relief in the form of a bargaining order would not preserve the "status quo" pending a determination by the Board. However, as shown, (supra, pp. 26-7), preservation or restoration of the status quo is not the sine qua non of injunctive relief in these proceedings. Indeed, if the district court's rationale were correct, the use of 10(j) injunctive relief might well be limited exclusively to cases involving unfair labor practices of commission, thus excluding its remedial provisions from use in cases involving unfair labor practices of omissions. Such a result would conflict with the express legislative objective of providing "injunctive relief in the case of all types of unfair labor practices" pending a final determination by the Board.

Moreover, this Court, in interpreting the term "status quo" held that ". . . any interpretations of the status quo to be preserved must be made with an eye to the statutory policies involved, . . .". McLeod v. National Maritime Union, 457 F. 2d 490, 496 (C.A. 2, 1972). Accord: Danielson v. Laborers Local 275, 479 F. 2d 1033, 1037 (C.A. 2, 1973); Kaynard v. Bagel Bakers Council of Greater New York, supra, 57 CCH Lab. Cas. Para. 12,499 (E.D.N.Y., 1968) ("the status quo to be preserved . . . is not the status as it exists when the application for 10(j) relief is heard, but rather that which prevailed on the eve of the initial act of the course of conduct reprehended.") Accordingly, in the instant case,

injunctive relief designed to preserve the status quo, should have been directed to the restoration of the status quo which was destroyed by the Company's unlawful conduct, i.e., restoration of the Union's majority status as bargaining representative and a right to bargaining since only the Company's illegal conduct stood in the way of the Union achieving that goal. However, the status quo which the decision of the court below sought to preserve was the destruction of the Union's majority status by the Company's unfair labor practices. As the Court of Appeals for the Fifth Circuit stated in Boire v. Teamsters, et al., supra, 479 F. 2d at 788 ". . . it would be improper to ignore the fact that [this] version of the 'status quo' is potentially illegal." See also Sacks v. Davis & Hemphill, Inc., supra, 295 F. Supp. at 148; Smith v. Old Angus, supra, 81 LRRM at 2942; N.L.R.B. v. S. E. Nichols-Dover, Inc., 414 F. 2d 561, 566 (C.A. 3, 1969).

The district court also expressed concern that granting a bargaining order under Section 10(j) of the Act would create a bargaining relationship between the parties which does not now exist and cannot be determined to exist until the Board resolves this case. (A. 79). This fear is unfounded; indeed, the Supreme Court noted in N.L.R.B. v. Gissel Packing Co., supra, 395 U.S. at 613 that "there is, after all, nothing permanent in a bargaining order . . ." The injunctive obligation to recognize and bargain with the Union would be coextensive only with the underlying unfair labor practice proceedings. It does not follow that by bargaining with the Union pursuant to a temporary injunction, the Company would thereby be required to undertake any obligation which would extend beyond the completion of the administrative proceedings. Indeed, the Company may legitimately condition

the continued effectiveness of any agreements reached upon the outcome of the Board's resolution of the unfair labor practice charges. Cf. Fergusen-Steere Motor Co., 111 NLRB 1076, 1079 (1955). In such event, should the Board ultimately conclude that the Company is not required to recognize the Union, the injunction would be dissolved and nothing would prevent the Company from withdrawing recognition from the Union and terminating any agreements reached.

Finally, the court below, in denying the issuance of a bargaining order, also concluded that the Board failed to make a showing of irreparable harm in the absence of injunctive relief. Here again, "irreparable harm" is not an indispensible prerequisite. Moreover, a bargaining order "down the road" will not be sufficient to breathe life into the Union. Rather, the Company will have profited from its deliberate unfair labor practices to the detriment of the statute, the employees and the Union. This loss cannot be measured in money. Compare Danielson v. Laborers Local 275, 479 F. 2d 1033, 1037 (C.A. 2, 1973).

CONCLUSION

It is respectfully submitted that the court below committed reversible error in finding that it was not just and proper to enter a bargaining order under Section 10(j) of the Act in this proceeding. Therefore, the judgment of that court should be reversed and the case remanded for entry of an order requiring the Company to bargain,

upon request, with the Union, as prayed for in the petition to the court below.

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OCTOBER, 1974.

STATUTORY APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. * * *.

* * *

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10

(j) The Board shall have power, upon issuance of a complaint in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

***

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B) or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such notwithstanding any other provision of law. Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *** Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to Section 8(b)(4)(D).

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-2150

THOMAS W. SEELER, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant

v.

THE TRADING PORT, INC.

Respondent-Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 1974, two copies of the Brief for Petitioner-Appellant and one copy of the Appendix to the Briefs were mailed in a government-franked envelope to Edward L. Bookstein, Esquire, Kohn, Bookstein and Karp, 100 State Street, Albany, New York 12207, attorney for Respondent-Appellee.

Andrew Tranovich
Attorney

Dated at Washington, D. C.
this 21st day of October, 1974.